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In the Supreme Court of the United States

October Term, 1981

No. 82-

JAMES MARTIN SMITH,

Petitioner

vs.

DOUGLAS GONZALES, et. al.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution.

2. Whether the admission into evidence of polygraph test results, over objection, prejudicially impeaches the credibility of the adverse party in a civil trial in violation of his rights to due process and trial by jury, and contravenes the Federal Rules of Evidence.

PARTIES TO PROCEEDING

All parties to the proceeding in the court below were James Martin Smith, petitioner at bar, Thomas P. Lane, respondent at bar, Ossie Brown, a district attorney, and the honorable Douglas M. Gonzales, a judge.

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The petitioner respectfully requests that this Court grant his petition for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Court of Appeal's opinion in this case is found at 670 F 2d 522 (C.A. 5 1982).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY PROVISION INVOLVED

The statute involved in this case is 42 U.S.C. Section 1983.

QUESTIONS PRESENTED

1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution.

2. Whether the admission into evidence of polygraph test results, over objection, prejudicially impeaches the credibility of the adverse party in a civil trial in violation of his rights to due process and trial by jury, and contravenes the Federal Rules of Evidence.

STATEMENT OF THE CASE

Petitioner filed this action, *pro se*, on April 10, 1978 pursuant to 42 U.S.C. Section 1983 alleging several violations of his constitutional rights involving two arrests, detention, and excessive bail. Named as defendants were Judge Gonzales, District Attorney Brown, and deputy Sheriff, Thomas P. Lane, respondent herein. Gonzales and Brown were dismissed under the absolute immunity doctrine. On October 16, 1980, prior to trial, petitioner filed his Motion In Limine requesting, *inter alia*, the exclusion of polygraph test results, which respondent indicated in his pretrial order that he intended to offer into evidence. The trial court admitted the polygraph test results over the objection of the petitioner. The jury rendered a verdict for respondent, and the district court dismissed the case on October 28, 1980. Notice of Appeal was filed on November 25, 1980, and the Court of Appeals for the Fifth Circuit affirmed the decision on March 15, 1982. Petitioner filed his "Suggestion for Petition for Rehearing En Banc" on April 12, 1982, after extension, and the Court issued its final decision denying the petition on April 26, 1982, treating the "Suggestion for Petition for Rehearing En Banc" as a "petition for panel rehearing".

The petitioner is a citizen of the United States and the State of Louisiana. He is the father of four children, one of whom, Shirley, was engaged to be married to Steve McDowell, whom petitioner employed in his aluminum products business. Petitioner had given Shirley permission to marry Steve and had undertaken preparations for the wedding. Upon receipt of a complaint from a customer that Steve was using drugs on the job, petitioner fired him. Shirley became upset, believing the wedding plans were off, and ran away with Steve. The next day petitioner located Shirley and Steve at Steve's parents house, and an altercation resulted. Police were summoned including the respondent, an investigation occurred, and the matter was closed as a family dispute with no one being charged with any criminal violation, although the petitioner attempted to obtain an arrest warrant against Steve for an assault. The same day respondent assisted Shirley in obtaining a coroner's warrant for the petitioner's involuntary commitment to a psychiatric facility for four days. The following day, the respondent, acting solely on a "hunch," and without probable cause, called Shirley to his office and began interrogating her on an alleged incestuous relationship with petitioner, which Shirley denied again and again. Finally, respondent threatened Shirley with an arrest for incest, and Shirley "admitted" the relationship. Respondent subsequently brought Shirley to the prosecutor's office to be interviewed by prosecutor Michael Ponder. At the meeting, respondent did not inform Mr. Ponder of the following facts:

1. That he had threatened Shirley with arrest for incest;

2. That petitioner had given permission to Shirley to marry Steve, and had undertaken preparations for the impending wedding;

3. That Steve and Shirley had smoked marijuana on occasion, and petitioner prohibited his children from using drugs;

4. That respondent had interrogated Shirley based solely on a "hunch," and that there existed no probable cause when respondent undertook his investigation.

After the meeting, Mr. Ponder, based on what he was told by Shirley and respondent, caused an arrest warrant to be issued against petitioner on the charge of incest. Respondent arrested petitioner on the charge at the psychiatric hospital facility and booked him at the East Baton Rouge Parish Jail. Bail was set at $100,000, and while petitioner was attempting to raise the bond, respondent went to Judge Gonzales, *ex parte*, informed the judge of hearsay threats petitioner allegedly made at the jail, and told the judge that petitioner was a "dangerous man". Judge Gonzales reset the bail at $250,000 which bond petitioner could not make. Ten days later bond was reduced to $50,000 by Judge Parker and petitioner made bond and was released. On the same day Shirley and Steve were married in the presence of relatives and respondent served as "best man".

Four months later on October 21, 1977 a preliminary hearing was held for petitioner on the incest charge. Prior to the scheduled preliminary hearing, petitioner was again arrested by respondent on October 9, 1977 on a charge of carnal knowledge, which he procured from a lengthy interview with a girlfriend of Shirley's, and this arrest was made known to the Court by respondent at the preliminary hearing. The Court found probable cause, in part due to the second charge on carnal knowledge.

A polygraph test was given to Shirley on January 19, 1978, and the examiner set forth four questions in a written report and concluded that Shirley's answers "showed definite indications of truthfulness." Petitioner was acquitted on the incest charge after trial on February 21, 1978 and the carnal knowledge charge was dropped. In the words of Mr. Ponder at trial, the charge was dropped because the prosecutor's office "didn't want to harrass Mr. Smith any further on any other charge".

At the trial of this case, Mr. Ponder testified on cross examination about the polygraph test as follows:

Q: So the polygraph test had nothing to do with the finding of probable cause, did it, Mr. Ponder?

A: No sir, it wasn't available at that time.

Q: So it had nothing to do with the finding of probable cause, did it Mr. Ponder?

A: Not on the arrest warrant, no sir.

Concerning the issuance of the arrest warrant, Mr. Ponder testified that he was unaware and was never informed that respondent had threatened Shirley with prosecution for incest, which he said was legally incorrect, and testified that had he known this fact it "would have made a difference in the issuance of the arrest warrant". Ponder also testified that he was not informed that petitioner had given permission to marry Steve, that petitioner had made preparations for the impending marriage, and that Steve and Shirley had used illegal drugs on occasions. Ponder also was unaware that respondent conducted his investigation based solely on a "hunch".

The first preliminary hearing was continued because of a breakdown in the recording equipment.

The Court of Appeals for the Fifth Circuit affirmed the jury verdict of the District Court holding that the prosecutor issuing the arrest warrant broke the causal chain and insulated the respondent from liability. The Court further held that since the arrest warrant was facially valid, the Section 1983 claims preceding the arrest warrant should have been dismissed and the fact the polygraph tests results were admitted into evidence over objection constituted harmless error. The Court assuming *arguendo* the existence of malice, did not consider relevant the malicious intent of the respondent and the lack of probable cause in securing the arrest warrant against the petitioner based upon *Rodrigues v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977) (en banc). This holding is in direct conflict with at least three other circuits, *Smiddy v. Varney*, 665 F. 2d 261, 267 (9th Cir. 1981); *Ames v. United States*, 600 F. 2d 183, 185 (8th Cir. 1979); and *Dellums v. Powell*, 566 F. 2d 167, 192 (D.C. Cir. 1977). The Court treating the admission of the polygraph tests results as "harmless error" conflicts with federal court of appeals decisions and state supreme court decisions addressing polygraph test results.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE PROPER INTERPRETATION OF QUALIFIED IMMUNITY UNDER 42 U.S.C. SECTION 1983 FOR A POLICE OFFICER WHO

MALICIOUSLY OBTAINS A FACIALLY VALID ARREST WARRANT FROM A PROSECUTING ATTORNEY.

In *Smiddy v. Varney*, 665 F. 2d 261, 267 (C.A. 9 1981) the Court held that

> "Thus we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." Accord: *Ames v. United States*, 600 F. 2d 183, 185 (C.A. 8 1979); *Dellums v. Powell*, 566 F. 2d 167, 192 (D.C. Cir. 1977).

These decisions conflict with the Fifth Circuit's holding in *Rodriguez v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977) (en banc), *cert. denied* 434 U.S. 1047 (1978), and in *Smith v. Gonzales*, 670 F. 2d 522 (5th Cir. 1982). The Fifth Circuit made no exception for the malicious conduct of the respondent and the misleading information given to the prosecutor, Mike Ponder, in obtaining the arrest warrant. The Fifth Circuit's opinion failed to account for these facts in rendering its decision, instead absolutely immunizing the police officer and as such there exists a conflict between circuits on this holding.

The facts adduced at trial on cross examination of Mr. Ponder establish that Mr. Ponder was never informed that the respondent interviewed the complaining witness solely on a "hunch", and without probable cause; and that in order to obtain an admission of incest from the complaining witness, the respondent informed her that she could be prosecuted for incest, after the complaining witness had denied the incestuous relationship repeatedly prior to the prosecution's threat. Mr. Ponder testified at trial that such a statement by the respondent is "incorrect as a matter of Law", and had he been aware of such a statement, that it "would have made a difference" in his decision to issue the arrest warrant.

Mr. Ponder also testified that at the time of issuing the arrest warrant, he was not informed that petitioner had given his

daughter permission to marry, and had bought wedding gifts for the impending marriage, which would argue against any incestuous relationship. Finally, Mr. Ponder testified that Shirley's desire to marry Steve over her father's objection, and fearing the marriage was off, would have been reason to concoct the incest story.

Petitioner believes that the evidence reflects malicious acts on behalf of the respondent, and the Court below so assumed. These malicious acts rebut the prosecutor's independent judgment, particularly the threat to prosecute the complaining witness for incest. Other facts which reflect the respondent's state of mind where he was "out to get" the petitioner include the respondent going to the judge ex parte, after bail was set at $100,000, and informing the judge of hearsay threats and that the petitioner was a "dangerous man". Bail was then raised to $250,000. The respondent also served as best man at petitioner's daughter's wedding.

The Court did not consider the issue whether the arrest warrant was tainted in its issuance, relying upon *Rodriguez, supra*, in *toto*, which holding has no exception for the officer who maliciously procures a facially neutral warrant. See 670 F. 2d at 526. Were this case heard in either the District of Columbia, the Eight or Ninth Circuits, the results would have been different.

The Court of Appeals held that no constitutional right of the petitioner was violated because the arrest was made under a "properly issued arrest warrant", relying upon *Baker v. McCollan*, 443 U.S. 137 (1979). In *Baker v. McCollan*, *supra*, this Court found no violation of 42 U.S.C. Section 1983 because the sheriff did not cause "the plaintiff to be subjected to deprivations of his constitutional rights", 443 U.S. at 142, but the deprivation was caused by mistaken identity after a valid arrest warrant was obtained, and probable cause existed. Here, the petitioner is attacking the arrest warrant procured maliciously by respondent; petitioner's liberty was restrained by the respondent without due process of law in violation of the Constituion. Unlike the other circuits, the Fifth Circuit fails to distinquish between intervening and interdependent causes. When a maliciously procured arrest

warrant and prosecution occurs, the decisions of the prosecutor, magistrate, grand jury, and trial judge could be proven interdependent. In the Fifth Circuit, however, the police officer would be absolutely immune regardless of evidence proving the causative role of the officer's malicious acts.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE ADMISSIBILITY OF POLYGRAPH TEST RESULTS, AND THE EFFECT OF THOSE RESULTS UPON ALL ISSUES PENDING BEFORE THE JURY.

The district court, over objections by petitioner, permitted the admission of polygraph test results for the reason of establishing the respondent's probable cause for the arrest. Petitioner believes that the evidentiary ruling by the district court, and the affirmance of that decision by the Court of Appeals for the Fifth Circuit conflicts with all legal precedent on the subject, particularly those circuits which hold polygraph test results to be *per se* inadmissible. *U.S. v Bowers*, 534 F. 2d 186 (10th Cir. 1976); *U.S. v Ameral*, 488 F. 2d 1148 (9th Cir. 1973); *People v. Leone*, 25 N.Y. 2d 511, 255 N.E. 2d 696, (C.A.N.Y. 1969); *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923); *People v. Anderson*, 637 P. 2d 354, (S.C. Colo. 1981) *en banc*, *Marks v. United States*, 260 F. 2d 377 (10th Cir. 1958), cert. denied, 358 U.S. 829 (1959). Federal Rules of Evidence, Rules 401, 402, 403.

The admission of the polygraph test results prejudiced the credibility of the petitioner on all issues before the jury. The Court of Appeals did not address the polygraph issue, instead holding that under *Rodriguez v. Ritchey*, 556 F. 2d 1185 (5th Cir. 1977), (en banc), the claims pertaining to the admission of the polygraph test results should have been dismissed. The Court noted in a footnote that polygraph tests results are inadmissible, but did not comment on the prejudicial effect of the polygraph test results on petitioner's case before the jury. The credibility of the petitioner was adversely affected by the admission of the polygraph test results. Petitioner submits that the admission of the test results cannot be directed, especially at the appellate stage, at one or more issues before a jury, but adversely affects

the entire trial on all issues.

The Court of Appeals did not directly address the issue of the admissibility of the polygraph test results because it believed that reaching the issue was unnecessary. In so doing, the Fifth Circuit departed from the rule in other circuits that polygraph examinations so adversely affect a jury's weighing of credibility that the test results are *per se* inadmissible. Now, the Fifth Circuit has carved out an exception that allows admission into evidence of the polygraph test results so long as the relevant substantive claim is not a basis for liability. This separation by claim of polygraph admissibility is both unworkable and unrealistic. Petitioner's rights to a fair jury trial were abridged by this ruling.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William H. Cooper, 5551 Corporate Blvd., Suite 1-H, P.O. Box 14647, Baton Rouge, LA 70898 this 23 day of July, 1982. I further certify that all parties required to be served have been served.

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Counsel for Petitioner

James Martin SMITH,
Plaintiff-Appellant,

v.

Douglas M. GONZALES, et al.,
Defendant

Thomas P. Lane, Defendant-Appellee.

No. 80-3988

United States Court of Appeals,
Fifth Circuit.

March 15, 1982.

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

CLARK, Chief Judge:

Plaintiff, James Martin Smith, appeals from a jury verdict in favor of the defendant, Baton Rouge Parish police officer Thomas P. Lane. In this section 1983 action, 42 U.S.C. § 1983, Smith alleged that his arrest and commitment to a psychiatric ward violated his constitutional rights, as did his arrest on separate charges of incest and carnal knowledge with a minor. He also alleged that Lane's role in the raising of his bail requirement violated his right to due process. Based on *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047, 98 S. Ct. 894, 54 L.Ed.2d 799 (1978), we hold that the district court should have dismissed the claims relating to the commitment, incest and bail. We affirm the jury's verdict that Smith's constitutional rights were not violated by this arrest for carnal knowledge.

The following facts are stated most favorably to plaintiff's position. Smith is the father of four children, including a daughter, Shirley. Shirley, age seventeen at the time of these events, was dating a young man named Steve McDowell. In March, 1977 she informed her father that she wanted to marry Steve. Smith apparently gave his consent, and thereafter hired Steve to work for his company.

On Thursday, May 26, 1977, Smith received a telephone call from the manager of an apartment building where Steve was working informing him that Steve and a co-worker were smoking marijuana on the job. Smith informed Shirley of this incident and told her that Steve was fired. Shirley left home that evening without returning.

The following day Smith learned that Shirley was at the home of Steve's parents, and so he proceeded to the McDowell residence. He encountered Steve when he arrived there, and the two exchanged angry words. Smith demanded to see Shirley, but was denied permission by Mr. McDowell. The heated exchange continued between Steve and Smith. Smith threatened to kill Steve, and subsequently as Smith returned to his car, Steve got a rifle from his house and threatened to kill Smith.

Smith drove away from the McDowell residence and was stopped one block away by police officers responding to a call made from the McDowell house while Smith was there. During the ensuing discussion with the police officers, Sergeant Thomas P. Lane of the Baton Rouge Parish Police appeared on the scene. After becoming aware of the particulars of the matter, Lane proceeded to the McDowell residence. Lane was informed by Mrs. McDowell of her suspicions that something was awry in the relationship between Smith and his daughter Shirley.

Lane returned to where Smith was being detained, and the other officers turned the matter over to him. Smith was then released. However, he proceeded to a precinct station of the East Baton Rouge Sheriff's department and by radio informed Lane that he wished to file a complaint against Steve McDowell for aggravated assault. Lane told Smith he could not handle the matter until the following Tuesday, and so Smith proceeded to the district attorney's office where he discussed the matter with assistant district attorney Michael Ponder, who in turn sent him to Chief Reeves of the Sheriff's Department.

Soon thereafter Shirley went to the precinct station to retrieve some of her personal items which were taken from Smith by the police officers. Acting solely on a hunch, Lane inquired of Shirley whether she had had sexual relations with her father. Shirley initially denied any such thing, but after repeated ques-

tioning, and an untrue admonition from Lane that she could be prosecuted for incest, Shirley stated she had an incestuous relationship with her father during the past two years.

During this meeting, Shirley's mother arrived. She was told by Shirley for the first time of the incestuous relationship. Mrs. Smith and Shirley then informed Lane of their fear for their own safety, particularly in light of Smith's behavior the day before. In answer to their question concerning protection, Lane informed them that they could try to get a coroner's warrant committing Smith to a secured psychiatric facility.

Mrs. Smith proceeded to see the coroner, Dr. Hypolite Landry, who issued a warrant after hearing her version of the events related above. Lane executed the warrant which resulted in Smith's commitment to an institution.

On Tuesday May 31, 1977, Lane and Shirley met with Ponder, the assistant district attorney, at which time Shirley informed Ponder of her incestuous relationship with her father. Ponder prepared an affidavit and arrest warrant for Smith. The affidavit was then presented to and the warrant was issued by state Judge Parker. Immediately upon Smith's release from the psychiatric institution he was arrested by Lane on the incest charge pursuant to the warrant. Bond was initially set at $100,000, but was raised to $250,000 by Judge Gonzales when Lane informed the judge that the jailer, Willie Wax, had witnessed Smith making vehement threats to kill Lane and that Smith was a dangerous man. Smith was unable to post this much bond, but ten days later it was reduced to $50,000, which he was able to post.

Shirley and Steve were married on June 10, 1977, the day Smith was released. Sergeant Lane served as best man. Lane's explanation for this is that on learning of Smith's release just prior to the wedding, Mrs. Smith summoned him for protection. He asserts that he was best man by default, since no one else was present to witness the ceremony.

Prior to a second preliminary hearing set for October 21, 1977, Sergeant Lane interviewed a young friend of Shirley's, Debbie Edwards, concerning a report that Smith had asked Edwards to "plant" marijuana in Shirley and Steve's car in order

to have them arrested. Lane taped the interview with Edwards, during the course of which Edwards finally admitted to having had sexual relations with Smith on two occasions. On October 9, 1977, Lane arrested Smith on a carnal knowledge charge.

A few months later the district attorney requested a polygraph test on Shirley Smith McDowell concerning the incest charge. In the opinion of the polygraph consultant, Shirley was being truthful in her allegations of incest. The incest charge was then submitted to a grand jury and a true bill was rendered. Smith was tried and acquitted on the incest charge. The district attorney dismissed the carnal knowledge charge.

Smith brought this section 1983 action in United States District Court. After dismissal of defendants District Attorney Ossie Brown and Judge Gonzales, Smith's action continued against Lane for deprivation of his constitutional rights alleging that Lane's involvement in the arrest on the coroner's warrant, the arrest on the incest charge, the setting of the $250,000 bond, and the arrest on the carnal knowledge charge was malicious, harassing and done in bad faith. They jury returned a verdict for Lane. On appeal Smith cites as error two evidentiary rulings by the district court. These relate to the admission of the polygraph results, and the tape recording of the Edwards interview. He also cites two procedural points: the failure of the court to instruct the jury on subjective bad faith, and Lane's failure to plead good faith affirmatively.

Under our en banc decision in *Rodriguez v. Ritchey*, 556 R.2d 1185 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978), the jury should never have considered the alleged violations of constitutional rights arising from the initial arrest on the coroner's warrant, the arrest on the incest charge, and the setting of bond. "The first inquiry in any section 1983 suit is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' " *Baker v. McCollan*, 443 U.S. 137, 139, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). "If there has been no such deprivation, the state of mind of the defendant is wholly immaterial." *Id.* As this court has stated, "it is distinctly different to say that the conduct of the defendant did not violate a constitutional right but the defen-

dant is immunized from liability by virtue of a qualified official immunity." *Barker v. Norman*, 651 F.2d 1107, 1124 (5th Cir. 1981).

[1-3] The constitution does not guarantee that only the guilty will be arrested, *Baker v. McCollan*, 99 S.Ct. at 2695. If it did, section 1983 would provide a cause of action for every defendant acquitted—indeed for every suspect released. *Id.* Where an arrest is made under authority of a properly issued warrant, the arrest is simply not a false arrest. *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977). Such an arrest is not unconstitutional, and a complaint based on such an arrest is subject to dismissal for failure to state a claim. *Id. Simon v. United States*, 644 R.2d 490 (5th Cir. 1981) (citing *Rodriguez*); *see Walker v. United States*, 471 F.Supp. 38, 40 (M.D.Fla. 1978).

[4, 5] *Rodriguez* controls the claims arising out of Smith's arrests pursuant to the coroner's warrant and the incest charge. These claims should have been dismissed. *See Simon v. United States*, 644 F.2d at 496. Arguably, the allegation that Lane acted in bad faith fits the category of cases which Judge Hill's concurrence urged be excepted from the holding in *Rodriguez*: *i.e.* where an officer maliciously procures a facially valid warrant. *See* 553 F.2d at 1194-95 (Hill, J., concurring). *See also Farmer v. Lawson*, 510 F.Supp. 91, 95 (N.D.Ga. 1981) (discussing cases involving reliance on a warrant). However, assuming *arguendo* that Lane acted maliciously in procuring these warrants[1] and that such ac-

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1. Smith asserted in support of his theory of Lane's bad faith that Lane's threat to prosecute Shirley for incest promoted the accusation against her father, and that Shirley's accusations were leveled against him to "put her father out of commission," thereby allowing her to marry Steve. Smith's theory is that knowing these facts, Lane's belief in Shirley's accusations without further investigation was unreasonable and demonstrated Lane's bad faith. Smith alleged also that Lane omitted telling Ponder of his threat of prosecuting Shirley and the other factors which would have led Ponder to question the veracity of her allegations. The allegations of what Lane knew and of what he omitted to tell Ponder are asserted to have created a jury issue of Lane's good faith belief in the lawfulness of his actions.

tion creates a false arrest, the second principle enunciated in *Rodriguez* would nevertheless control this factual setting. We stated in *Rodriguez* that if the facts supporting an arrest are put before an intermediary such as a magistrate or grand jury, the intermediary's decision to issue a warrant or return an indictment breaks the causal chain and insulates the initiating party. 556 F.2d at 1193. Here, Lane arranged to have Shirley Smith tell her story directly to Ponder the assistant district attorney who then filed the affidavit resulting in the issuance of the arrest warrant by Judge Parker. Because Shirley Smith personally appeared before Ponder, Lane's good faith belief in her truthfulness and thus the existence in his own mind of probable cause became irrelevant. Rather, it first became Ponder's duty, having had his own first-hand encounter with the person complaining, and then Judge Parker's when he read Ponder's affidavit, to make their own inquiry and determination as to whether an affidavit should be made or whether there was probable cause to arrest Smith based on Shirley's statements. A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers—all of whom may be potential defendants in a section 1983 action—is entirely consistent with due process of law. *Baker v. McCollan*, 99 S.Ct. at 2695. The independent decisions of these intermediaries broke the causal chain between Lane and any constitutional violation.

[6, 7] Smith has urged that the district court erred in failing to instruct the jury as to the subjective bad faith prong used to rebut a claim of qualified immunity. *See Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). But even if Lane had a desire to "get" Smith, that desire would be immaterial under these facts. Just as an officer's good intent is irrelevant where he contravenes settled law, *Douthit v. Jones*, 619 F.2d 527, 533 (5th Cir. 1980), so too a bad faith motive to "get" a suspect is irrelevant if the arrest is supported by a properly issued warrant or by the existence of probable cause. *Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977). This is so because such an arrest is constitutional in the first instance, *Rodriguez v. Ritchey*, *supra*, making the officer's state of mind

immaterial. *Baker v. McCollan, supra*. Once a warrant is issued, or probable cause comes into existence, it becomes an officer's duty to arrest the suspect regardless of his personal feelings, good or ill, towards the suspect. *Parry v. Jones*, 506 R.2d 788, 780 (5th Cir. 1974). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause or a warrant and being mulcted in damages if he does. *Turner v. Raynes*, 611 F.2d 92, 93 (5th Cir. 1980), *citing Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967).

Similarly, no constitutional violation could have stemmed from the facts asserted by Smith concerning the issuance of the coroner's warrant, or the setting of bond. In each of these instances, the exercise of independent responsibility broke the causal chain. Mrs. Smith personally appeared before Dr. Landry. Dr. Landry independently determined the propriety of issuing the warrant, as he testified was always his practice. Because Dr. Landry chose to issue the warrant, the arrest and commitment were valid, and hence constitutional. Lane's actions in carrying out the command of the warrant to deliver Smith for commitment were the only lawful response he could make.

The same principle applies to the setting of bond. The jailer testified below that Smith's threats to kill Lane were of such a nature as to cause him to alert Lane through Chief Reeves. Lane relayed the information concerning these threats, and their source, to Judge Gonzales. Judge Gonzales then exercised his independent judgement in deciding whether Smith's bail should have been raised. Although Smith denies making these threats, the uncontradicted evidence shows that the jailer related that threats were made and that Lane accurately relayed to Judge Gonzales the jailer's version. Judge Gonzales' independent judgment broke the causal chain.

[3] The facts adduced as to Lane's arrest of Smith on the charge of carnal knowlege present a different problem. The record does not reflect that this arrest was made pursuant to a warrant. We assume it was warrantless. The testimony indicates that Lane arrested Smith after an interview with Shirley Smith's young friend, Debbie Edwards, during which she admitted that

she had had sexual relations with Smith on two occasions. Absent the intervention of an independent magistrate, the trial court followed the prudent course of submitting to the jury the issue of whether this warrantless arrest was made in good faith or with probable cause. *Reeves v. City of Jackson*, 606 F.2d 644, 650 (5th Cir. 1979).[2] The jury decided it was.

[9] Smith attacks the jury verdict on this claim by alleging that the court erred in admitting the tape recording of Debbie Edward's interview with Lane. This argument is without merit. Lane testified that the interview was the sole basis for the arrest and thus the relevance of the content of that interview was established. Also, the tape was authenticated as the entire substance of what transpired in that interview. Smith also raises a hearsay objection to admission of the tapes. The district court adequately instructed the jury to limit their consideration of the tape to whether Lane acted in good faith in seeking an arrest warrant based on Edwards' statements. Moreover, Edwards was on the stand when the tape was played. Plaintiff's counsel had ample opportunity to and in fact did conduct a searching cross-examination of Edwards as to the circumstances surrounding the interview, and her entire involvement in the case.

Smith urges that admission of the results of the polygraph tests given to Shirley Smith was error. This issue pertains to the claim arising out of the arrest for incest. Having found that claim to be without merit in the first instance we need not address the polygraph issue.[3]

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2. *But see Greer v. Turner*, 639 F.2d 229,232 (5th Cir. 1981); *Hunter v. Clardy*, 558 F.2d 290, 291-92 (5th Cir. 1973). These cases found probable cause to exist as a matter of law.

3. Our circuit adheres to the rule that polygraph evidence is inadmissible. *United States v. Clark*, 598 F.2d 994 (5th Cir. 1979). *See* 22 C. Wright and K. Graham, *Federal Practice and Procedure*, § 5169, at 106 (1978). *United States v. Clark* was a criminal case where the polygraph was offered on the issue of guilt or innocence. We have made no exception to the rule for civil cases, nor for instances where the polygraph results are purportedly offered for a purpose other than that of asserting the

Smith's other assertions of error by the district court are without merit. His claim that Lane's affirmative defense of qualified immunity was neither adequately pled nor tried by consent is frivolous, as demonstrated by the colloquy between his counsel and the trial court concerning the inclusion of this issue in the pre-trial order, and his concessions concerning that colloquy at oral argument. His argument that the trial court refused to instruct the jury concerning subjective bad faith is unreviewable because he never actually requested such an instruction. Even if it had been preserved, subjective bad faith is irrelevant if the arrest is constitutional in the first instance.

Had counsel for defendant Lane cited *Rodriguez v. Ritchey*, and the cases in our circuit adhering to its mandate to the trial court, the cause might have ended there. The judgment appealed from is affirmed. Each party shall bear its own costs.

AFFIRMED.

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truth of the matter contained therein. *See, e.g., United States v. Kampiles*, 609 F.2d 1233, 1244 (7th Cir. 1979) (to prove statements were voluntary); *People v. Lara*, 12 Cal.3d 903, 117 Cal.Rptr. 549, 528 P.2d 365 (Cal. 1974) (to prove informant's credibility on issue of probable cause); *Walther v. O'Connell*, 72 Misc.2d 315, 339 N.Y.S.2d 386 (1072) (civil). We do not reach this issue here.

REVISED 3/3/82

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
APR 26 1982
GILBERT F. GANUCHEAU
CLERK

No. 80-3968

JAMES MARTIN SMITH,

Plaintiff-Appellant,

versus

DOUGLAS M. GONSALES, ET AL.,

Defendant,

THOMAS P. LANE,

Defendant-Appellee.

- - - - - - -

Appeal from the United States District Court for the Middle District of Louisiana

- - - - - - -

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 01/15/82, 5 Cir., 1982, _____ F.2d _____).

(APRIL 26, 1982)

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

[illegible] FILED LOCAL RULE 17 FOR STAY OF THE MANDATE

REHG-8

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term
1981

No. 82-145

JAMES MARTIN SMITH,

Petitioner

vs.

DOUGLAS GONZALES, et al.

Respondent

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
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No. 82-145

JAMES MARTIN SMITH,

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Respondent

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully requests that this Court refuse petitioner's request for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

This entire action arises out of and revolves around a criminal investigation made by the defendant, Thomas P. Lane, of the East Baton Rouge Sheriff's Office concerning James Martin Smith, petitioner.

The incident took place in the area of East Baton Rouge Parish known as Central. This is a small, rural setting located approximately fourteen miles from the City of Baton Rouge. There is a Sheriff's substation there which provides the police protection for the area.

On May 27, 1977, Sgt. Lane was dispatched to the home of a Mr. & Mrs. McDowell. Upon arrival there, he found several other policemen, the appellant in this case, the McDowell family and Shirley Smith, the daughter of appellant. An altercation had developed between Mr. Smith and the McDowells involving threats and firearms. Sgt. Lane was directed to take over responsibility for the investigation and proceeded to do so.

Having determined that it was a family matter, Sgt. Lane returned Mr. Smith's pistol to him, talked briefly with the McDowells and was told by Mrs. McDowell, the mother of Shirley Smith's fiance, Steve McDowell, that the relationship between Shirley and her father was "not normal".

During the course of his conversations with Mr. Smith, Sgt. Lane had received a bank book belonging to Shirley. Thereafter, on the same day, Mr. Smith contacted Sgt. Lane with reference to filing charges against the McDowells and Sgt. Lane told him that he

could not handle the matter until Tuesday, hoping that tempers would have cooled. The Monday following the altercation was a holiday. Mr. Smith was not satisfied with this, and went to the East Baton Rouge Parish District Attorney's office and was referred to Chief Reeves, the chief criminal deputy of the East Baton Rouge Parish Sheriff's Office, but no charges were filed at that time against the McDowells.

On Saturday, Shirley came to the substation to pick up her belongings. Sgt. Lane questioned her and based on a hunch fostered by the earlier problem and Mrs. McDowell's statement, asked her about the possibility of incest and explained to her that it was against the law and that her father could be prosecuted if she desired it, if he was guilty of the crime. At first Shirley denied this, but later admitted that she had had incestuous relations with her father for approximately three years. At the time of her admission of these facts she was fifteen.

Shirley, at Sgt. Lane's direction, told her mother of this. Shirley's mother and father were estranged. Shirley's mother discussed this with Sgt. Lane and was told that they could seek assistance from the coroner's office if they were afraid of Mr. Smith based on his actions.

Thereafter, Shirley's mother went to the coroner's office with one of her relatives. She discussed the matter with the coroner, was interviewed by the coroner who, using his own independent judgment, without conversation with Sgt. Lane, issued a commitment order for observation of Mr. Smith. Sgt. Lane being the officer on duty at the time the commitment was issued

received notice from the coroner's office to pick up Mr. Smith and did so.

On Tuesday, Shirley came back to the substation and went to the District Attorney's office downtown with Sgt. Lane. At that time, she was examined by the coroner at the District Attorney's request and following that, the Assistant District Attorney who inteviewed her, Michael Ponder, based on his questioning of Shirley and his belief in her veracity, issued a warrant for the arrest of Mr. Smith for incest.

After Mr. Smith was placed in jail on this charge and after Sgt. Lane had left the jail, one of the jailers called Sgt. Lane's superior, Chief Reeves, and advised him that Smith was making serious death threats against Lane. Chief Reeves then advised Sgt. Lane to notify Judge Gonzales, who was setting the bond, of these threats, at which time, Judge Gonzales, who has absolute discretion in these matters, raised the bond to $250,000.

Thereafter, Mr. Smith requested and received a preliminary hearing. At the preliminary hearing, Judge Gonzales found probable cause to hold him for trial. When the transcript was made of that testimony, it was discovered that the recording device had failed and therefore a second preliminary hearing was held before Judge Donovan Parker. At that time, Judge Parker found probable cause to hold Mr. Smith for trial. Shirley testified at each of these hearings. Thereafter, at the request of Mr. Smith, a Grand Jury was convened and Mr. Smith was allowed to present evidence before the Grand Jury. Shirley Smith also testified before the

Grand Jury and the Grand Jury found probable cause to hold Mr. Smith for trial. Thereafter, at the request of Mr. Smith, a lie detector test or polygraph was given to Shirley. Shirley passed the polygraph test.

Ultimately, trial was held before Judge Donovan W. Parker, and Mr. Smith was acquitted of the charge. He brings the resulting lawsuit, the trial was had before the Honorable Frank Polozola, U.S. Judge for the United States District Court for the Middle District of Louisiana before a jury, and after trial of the cause, the jury in fifteen minutes returned a verdict in favor of Sgt. Lane.

The appeal was prosecuted to the Fifth Circuit, who also denied petitioner's complaints.

REASONS FOR DENYING THE WRIT

Appellant states in his questions presented the following for number one:

> "1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution."

The simplest and shortest answer to this particular question would be that there was no malice, no withholding of any relevant information and no misleading of a prosecuting attorney. Discussion will be had as to each of these points.

The malice alleged by petitioner is "proved" by Deputy Lane's actions, which consisted of going to the scene of an altercation, interviewing the people in-

volved (none of whom he knew before the incident) and following up on information given to him during the interviews. Mrs. Faye McDowell, Steve's mother, told respondent during the course of the interview that Shirley and Mr. Smith's relationship was not anormal father-daughter relationship. The day after the altercation, Shirley went to the police substation to pick up some personal belongings. Because of the information given to respondent by Mrs. McDowell, Deputy Lane asked Shirley if she wanted to talked. During their conversation, Lane asked Shirley about her relationship with her father. At first she denied there was anything wrong, but when Lane informed her that a father's sexual advance toward his daughter were unlawful and that she could take legal action to stop them, she voluntarily told Lane of the incestuous relationship. She was never threatened with prosecution for incest, she was simply informed that you (meaning anyone) could be prosecuted for incest. On page 112 of Vol I of the testimony in the United States District Court, Middle District, lines 21 to 25 she testified:

> "He (Lane) told me that incest was against the law; that there was a penalty for it; and he told me if I wanted to, I could press charges; if not, I didn't have to. But I decided to press charges. And, if I would have know a lot sooner, he (Smith) would have been arrested a lot sooner."

As part of petitioner's initial claim of malice, he alleged that Deputy Lane, in advising Mrs. Smith of her right to go to the coroner, was being malicious toward him, however, testimony at the trial indicated that Mrs. Smith went to the coroner unaccompanied by Sgt.

Lane, talked to the coroner on her own and the coroner himself made the determination to pick up Mr. Smith based on Mrs. Smith's information. Certainly Sgt. Lane cannot be responsible for that. It must be rem ember at the time that petitioner complains of all of this malice that Sgt. Lane, on the date of the altercation, did not arrest Mr. Smith, gave him back his gun and simply refused to accept a charge on that day that Mr. Smith desired to file against the McDowells. Petitioner has never stated or given any reason as to why the Deputy would have gone through all of these machinations to arrest someone for incest that he never knew before. The fact that Sgt. Lane was acting as a good policeman in doing his job apparently has not crossed petitioner's mind. Petitioner has never come up with a reason that Sgt. Lane's action should be considered as malicious. No motive ever was shown, and indeed petitioner's allegations i.e. that Sgt.Lane accompanied Mrs. Smith to the coroner's office and assisted the coroner were found to be totally without merit.

Petitioner further alleges that Deputy Lane withheld relevant information. The statements with reference to the withholding of relevant information from Mr. Ponder, the Assistant District Attorney, are complained of by petitioner and itemized as follows:

> 1. That he (Sgt. Lane) had threatened Shirley with arrest for incest.

This statement was denied by Sgt. Lane and was not corroborated by Shirley Smith. Mr. Ponder, in response to petitioner's question concerning whether or not Sgt.

Lane had told the girl about being prosecuted for incest responded:

"... that it would have made a difference to him"

and went on to state in his answer:

"... if I was convinced she was still telling the truth I am sure I would have (found probable cause)" Trial record, page 305 and 306.

The next complaint:

2. That petitioner had given permission to Shirley to marry Steve and had undertaken preparations for the impending wedding.

The response of Mr. Ponder to this was:

"Q. Did you find out at that meeting (the initial meeting with Miss Shirley Smith) that Mr. Smith gave Shirley and Steve permission to get married prior to that time? Were you aware of that at that time?

A. I don't know, I don't recall at that meeting. I do remember finding that out.

Q. Subsequently?

A. Yes.

Q. But at that meeting you weren't aware of it?
A. I don't know, I could have been."

And for the next:

3. That Steve and Shirley had smoked marijuana on occasion and petitioner prohibited his children from using drugs.

The testimony of Mr. Ponder reveals on that point:

"Q. Did you know that Mr. Smith objected to the marriage because Steve was smoking marijuana? Did you know that at the time?

A. I don't know if I knew it at the time, I knew that was the reason he had given sometime thereafter...

Q. Did you have any reason to believe at that meeting that Shirley may have had a motive for lying to you about the incest charge?

A. As I said, I took that into consideration before taking her statement. I did consider that, yes, sir."

The final delineation:

4. That respondent had interogated Shirley based soley on a hunch and that there exists a no probable cause when respondent undertook his investigation.

We cannot respond to that particular charge except to state that there was not discussion had with District Attorney Ponder about a hunch or a non-hunch. Deputy Lane indicated that he interrogated Shirley along those lines based on his observation of James Martin Smith's conduct, the statement by Mrs. McDowell of Shirley and Martin's relationship and Shirley's appearance when she came to see him. There is no testimony in the record reflecting what questions were asked by Mr. Ponder of Sgt. Lane, however, we submit that a policeman's hunch which uncovers a crime is as valid as him turning a corner and seeing a crime being committed.

There was no misleading by Sgt. Lane. This a crime involving a victim who was a minor. There were no witnesses. No testimony has been established which would show that Sgt. Lane withheld any information and plaintiff attempts to suggest by innuendo that since Sgt. Lane did not tell District Attorney Ponder of everything that he was concealing. Not so. The District Attorney's office through Mr. Ponder, indicated that they interviewed Shirley Smith and that she gave her

statement without prompting or assistance on any part, and that the charge was taken because of their belief in her veracity. Sgt. Lane could have simply relayed the information to Mr. Ponder and obtained the warrant based on Lane's statement alone of probable cause. However, he brought the young lady to the courthouse where she as interviewed by Mr. Ponder who then issued the charged. Lane did not even need a warrant but could have arrested Mr. Smith based on his own discretion. He did not do so. He followed the proper procedure and even went one step beyond in bringing the complaining witness down to be interviewed by the District Attorney who then decided to issue the warrant. Mr. Ponder could have refused the charge, he did not because he questioned Shirley, had her examined by the coroner and *believed her*. Mr. Ponder could have ended the entire matter by refusing to issue the warrant. He testified that the warrant was issued not at Sgt. Lane's request but based on Ponder's evaluation of Shirley and his belief that she was telling the truth.

Judge Parker (the Duty Judge at the time) reviewed the warrant and caused Lane to then arrest Smith for incest.

These intermediaries' decisions that probable cause existed broke the causal chain and insulate Sgt. Lane from liability for false arrest or malicious prosecution. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977). Further, even if Sgt. Lane had acted maliciously, which was never proved, he could not be held liable since his involvement in the issuing the arrest warrant was limited to investigatory work. *Rodriguez v. Ritch-*

ey, id. at 1193. Because Shirley Smith, the complainant, personally appeared before Mr. Ponder and voluntarily answered his questions, he had a first-hand encounter with the victim. It *was* because of what Shirley told Mr. Ponder that he drew up an affidavit and presented it for Judge Parker's independent consideration. Sgt. Lane's motives or belief became irrelevant because he brought the complainant before an independent intermediary, Mr. Ponder. The intermediaries, who became involved after Sgt. Lane's preliminary investigation, secured an arrest warrant for Mr. Smith. They were acting entirely within their functions and acted with "due process of law". See *Baker v. McCollan*, 995 S. Ct. 2689, 2695 (1979). Mr. Smith was arrested under authority of a properly issued arrest warrant obtained by an Assistant District Attorney completely separate and independent of Sgt. Lane. The arrest warrant was not a "false" arrest or just a "facially" valid arrest, it was a valid and true arrest based on probable cause. The Fourth and Fourteenth Amendments do not protect against all deprivations of liberty. The Amendments protect only against deprivations of liberty accomplished without probable cause or due process, *Baker v. McCollan*, 995 S. Ct. 2689 (1979). Given the requirement that the arrest be made on finding probable cause and given the fact that Mr. Smith's arrest was made after two intermediaries independently determined probable cause, Sgt. Lane's feelings were immaterial. See *Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977). Sgt. Lane simply fulfilled the duties of his office in arresting Mr. Smith. Once a valid arrest warrant is

issued, it becomes the officer's duty to arrest the suspect regardless of any personal feelings toward the suspect. *Perry v. Jones*, 506 F.2d 778, 780 (5th Cir. 1974).

The second question by petitioner concerns whether the admission into evidence of Shirley's polygraph test (made at petitioner's request) results prejudicially impeached the credibility of the adverse party in violation of his due rights to due process and trial by jury, and contravened the Federal Rules of Evidence.

Petitioner alleged that Sgt. Lane violated his Constitutional rights because there was no probable cause to arrest petitioner. Sgt. Lane testified that he believed there was probable cause based on his belief in the truth of Shirley's allegations of incest.

The limited use of the polygraph test results does not constitute reversible error. The relevant portions of the trial proceedings concerning the polygraph test results are found at Vol. II, pages 287 and 290. The Judge carefully explained over and over to the jury that the results were only introduced to show if it was reasonable that respondent believed Shirley's allegations that incest had occurred. The jury knew that petitioner had been acquitted of the incest charges. This knowledge coupled with the Judge's explicit admonitions could not prejudice the jury or constitute reversible error. The Judge carefully instructed the jury that they could not use the test results to support, contradict or impeach a witness. The following is one of the Judge's careful explanations taken from Vol. II, page 478, lines 7 to 21:

> "The lie detector test is not being admitted to establish the truth of the matters asserted in the lie-

detector results. However, the Court has allowed you to consider this evidence so that you can make a determination as to whether or not the plaintiff's constitutional rights were or were not violated by the defendant; and that is the sole limited use that you may make of these particular two pieces of evidence.

You may not use that to support or to contradict or to impeach a witness; only to determine what information . . . the defendant had possession of . . . at the time that he took certain actions so that you may make a determination as to whether or not his actions were malicious, in bad faith, or whether or not they were good faith, and whether or not the plaintiff's constitutional rights were, in fact, violated in this case."

Petitioner alleged in his second amended complaint, paragraph 13 (f) that respondent's malicious acts took place throughout the prosecution of petitioner and, as such, all pertinent information used during the prosecution is relevant. As the trial Judge made abundantly clear, the results were introduced to aid in determining if respondent acted without malice and with probable cause in the arrest and prosecution of Mr. Smith. Vol II. pages 288 to 477. The admission of the test results into evidence for such a limited purpose was relevant and necessary to aid in determining if Sgt. Lane could have believed Shirley. Because it was the actions and intents of Sgt. Lane which were at issue, it is submitted that the test results were used as testimony of an expert witness in the believability of a complainant.

As in *Walther v. O'Connell*, 339 N.Y.S. 2d 389 (1972), the use of polygraph test results as testimony of

an expert witness was admissable when used to determine if a party was lying about an issue central to the case. The central issue concerning the admission of the test results was if Sgt. Lane believed Shirley. Respondent urges that the use of test results as expert testimony is limited to the believability of Shirley's allegations. If she could pass the polygraph test, it is reasonable that she could convince Sgt. Lane that she was telling the truth. The truth of what Shirley said is not the issue, the probability that Sgt. Lane believed her is. As in *Walther v. O'Connell*, id. the Court was not bound to the results of the test anymore than to the testimony of an expert witness and it was weighed *with all other testimony*.

In *People v. Lara*, 528 P.2d 365 (Cal. 1974), the court held:

> "Defendant's second complaint is that an investigation officer testified that the material witness on probable cause had submitted to a lie detector test and this event substantiated his belief that the witnesses' story was credible. But whatever may be the rule on the *results* of a polygraph test as evidence of *guilt* — a question we do not reconsider today — we are cited no authority holding such collateral use of the test for investigative purposes to be improper."

Respondent urges that the use of the test results as it related to the credibility of Shirley's story and Sgt. Lane's belief of it is not improper. Respondent further urges that the admissability of the test results is within the discretion of the trial judge to decide whether or not to receive such evidence for such a limited purpose. See *United States v. Lanza*, 356 F. Supp. 27 (1973) and

United States v. Kampiles, 609 F.2d 1233 at 1244 (1979).

It is submitted that the admission of the polygraph test made by petitioner's request was not prejudicial, particularly when viewed in light of all the evidence before the jury. The admission of the polygraph results which was carefully prefaced by the Judge took less than ten minutes out of a two day trial. Petitioner had already shown that he had been acquitted of the charge. The test before the jury was the validity of the arrest and subsequent trial. The jury was also apprised of the fact that two preliminary hearings had been had which found probable cause and the Grand Jury found probable cause.

Certainly the jury would not have considered the polygraph as a controlling factor with the above evidence plus the testimony of Assistant District Attorney. Mike Ponder, Dr. Hypolite Landry, and Coroner and Sgt. Lane that they did believe Shirley Smith.

CONCLUSION

For the foregoing reasons and based on the records of all prior proceedings, the Judgement of the Fifth Circuit should be affirmed. Petitioner never proved malice on the part of Deputy Lane or that respondent mislead anyone or withheld any information from anyone. Further, the admission of the polygraph test results was necessary and relevant to prove Deputy Lane's reasonable belief as to the truth of Shirley's allegations and his lack of malice.

Respectfuly submitted,

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COUNSEL FOR
RESPONDENT
THOMAS P. LANE

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Opposition to Writ of Certiorari were mailed, postage prepaid, to Andrew J. Ruzicho, 398 Grant, Suite 211, Columbus, Ohio 43215 this 4th day of October, 1982. I further certify that all parties required to be served have been served.

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OCT 25 1982
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In the
Supreme Court of the United States

October Term, 1981

No. 82-145

JAMES MARTIN SMITH,

Petitioner

vs.

DOUGLAS GONZALES, et. al.

Respondent

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

October Term, 1981

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JAMES MARTIN SMITH,

Petitioner

vs.

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Respondent

PETITIONER'S REPLY BRIEF

REPLY BRIEF

On October 4, 1982, respondent served his brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Petitioner files his Reply Brief pursuant to Rule 24, Rules of the Supreme Court.

In Respondent's brief, he raises a factual dispute as to whether the respondent threatened the petitioner's daughter during her interrogation with prosecution for incest in order to have her admit an incestuous relationship, and then procure an arrest warrant from the district attorney's office based upon the admission. The respondent cites certain testimony from the trial transcript which, in the opinion of the petitioner, misleads this Court of that question. Petitioner cites to the Court the actual testimony on this point as follows:

Q. Now, during this meeting with Sargeant Lane, Mrs. McDowell, isn't it a fact that he told you that incest was against the law, and that you could be prosecuted for incest? Didn't he tell you that?

A. Yes, he did.

(R., p. 11, lines 19-23).

Q. That upset you, didn't it, Mrs. McDowell, the fact that he told you that incest was against the law and that you could be prosecuted for it? That upset you, didn't it?

A. It moreorless shocked me because I didn't know it was against the law.

(R., p. 112, lines 6-11).

Q. Didn't Sargeant Lane tell you in so many words at that interview that if you filed the incest charge you could put your Dad out of commission for a while and that you and Steve could then get married? In so many words, didn't he tell you that?

A. Yes.

(R., p. 113, lines 7-12).

In addition to the above testimony, the Fifth Circuit, in rendering its decision, stated the facts most favorably to the petitioner and assumed that the respondent threatened petitioner's daughter with arrest for incest (Appendix to Petition, A-2, A-3). The respondent in his brief chose to oppose the writ by arguing a factual dispute, which is no dispute at all since the trial record and the Fifth Circuit's opinion support the petitioner's position. The respondent did not address substantively the cases cited by the petitioner raising the conflict between the circuits.

On the issue involving the polygraph test, the respondent fails to point out that the polygraph test given petitioner's daughter occurred on January 19, 1978, while the respondent procured the arrest warrant on May 31, 1977, approximately eight months prior to the test. The District Court's stated purpose for the admissibility of the test results was to show the probable cause of the respondent on the arrest warrant. The petitioner submits that the polygraph test results could not support the probable cause even if the polygraph test results were admissible. The district attorney who was prosecuting the incest charge in state court testified at trial that the test results did not support any probable cause on the arrest warrant.

In summary, the respondent has not fully related to this Court the facts upon which this petition is based, and the effect of respondent's brief is misleading, and contrary to the basis upon which the Fifth Circuit made its decision. The petitioner respectfully requests the Court to grant the writ of certiorari and review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Reply Brief were mailed, postage prepaid, to William H. Cooper, 5551 Corporate Blvd., Suite 1-H, P.O. Box 14647, Baton Rouge, LA 70898 this 22 day of October, 1982. I further certify that all parties required to be served have been served.

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